ORIGINAL

No. 85-6725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM JOHN BOURJAILY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether co-conspirator statements were properly admitted at trial under Fed. R. Evid. 801(d)(2)(E) and the Confrontation Clause.

2. Whether the evidence was sufficient to support petitioner's convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 781 F.2d 539.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1986. Justice O'Connor extended the time for filing a petition for a writ of certiorari to April 15, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent prison terms of 15 years and to a three-year special parole term on the substantive count. The court of appeals affirmed (Pet. App. A1-A7).

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A3-A4). It showed that FBI informant Clarence Greathouse arranged for a transfer of one kilogram of

cocaine to co-defendant Angelo Lonardo to be sold by people Lonardo was to select. On May 12, 1984, Greathouse, equipped with a body recorder, met with Lonardo to discuss the possibility of a sale. In this taped conversation, Lonardo indicated that he had talked to "the people" and they were interested. He then stated that the deal would be handled as had been done in the past. He stated that his contacts did not know that Greathouse was his supplier and that he wanted to keep it that way. Greathouse demanded one-half of the purchase price before delivery and requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed. Id. at A3.

On May 17, 1984, Greathouse asked Lonardo for money. Lonardo responded that he would get in touch with "some people" and contact Greathouse again. Lonardo called Greathouse on May 19 to arrange delivery of the money, and the delivery occurred. Greathouse and Lonardo had several other conversations as the deal was being finalized. On May 24, Greathouse told Lonardo that the cocaine had arrived. In a taped conversation, Lonardo said that he would try to contact some people but that he had told them that the deal was off because of a misunderstanding about the purchase price. Pet. App. A3.

In a taped telephone conversation on May 25, Lonardo told Greathouse that he had a "gentleman friend" present who "had some questions" to ask Greathouse. Lonardo indicated the he wanted Greathouse to call back immediately. The second call was not recorded, but Agent Dorton of the FBI listened to both sides of the conversation. Greathouse spoke directly with Lonardo's "gentleman friend" (Tr. 167-168). Greathouse testified that he discussed how the "gentleman" was to pay, as well as the quality, purity, formation, and clarity of the cocaine. Agent Dorton confirmed that Greathouse spoke with a person other than Lonardo (Tr. 754) and that these topics were discussed. The "gentleman friend" told Greathouse that he would pay $15,000 "up front" and the balance after the cocaine was tested (Tr. 168). Later that

day, Lonardo told Greathouse in a taped conversation to park his car behind the Hilton Hotel, where Lonardo would be waiting for him in the lobby. Lonardo stated, "My friend will be out in his car and I'll just go over and you know." Pet. App. A3.

Thereafter, FBI agents placed four quarter-kilogram bags of cocaine in Greathouse's car. When Greathouse arrived at the Hilton, petitioner was in a car in the parking lot. Petitioner had driven around the parking lot, examining the parked vehicles. Greathouse entered the Hilton and gave Lonardo the keys to his car. Lonardo walked to Greathouse's car, circled it, and then walked to petitioner's car. Lonardo then walked back to Greathouse's car and removed the cocaine. As Lonardo neared Greathouse's car, petitioner turned his car around and moved to a point near Greathouse's car. Lonardo took the cocaine from Greathouse's car and handed it to petitioner, who accepted it. The agents then arrested petitioner and Lonardo and recovered the cocaine from petitioner's car. They found $19,100 under the passenger seat of petitioner's car and $1000 in the glove compartment. Pet. App. A1-A4.

ARGUMENT

1. Petitioner contends that Lonardo's tape-recorded statements to Greathouse were improperly admitted as co-conspirator declarations (Pet. 12-16) and that the use of those statements violated the Confrontation Clause of the Constitution (Pet. 17-22). These claims are without merit.

a. Under the co-conspirator rule, Fed. R. Evid. 801(d)(2)(E), in order to obtain the admission of co-conspirator declarations the government must show by a preponderance of the evidence that a conspiracy existed, that the defendant against whom the hearsay is offered was a member of the conspiracy, and that the declarations in question were made in furtherance of the conspiracy. See, e.g., United States v. Vinson, 606 F.2d 149, 152 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. James, 590 F.2d 575, 582 (5th Cir.) (en banc), cert.

denied, 442 U.S. 917 (1979). Petitioner argues that the evidence at trial failed to establish that he and Lonardo were co-conspirators.

In rejecting this claim, the court of appeals relied in part on the evidence of Lonardo's out-of-court statements themselves (Pet. App. A4). In so doing, the court of appeals followed its own consistent precedent holding that Fed. R. Evid. 104(a) 1/ modifies prior law and permits a trial court to give some consideration to the substance of an alleged co-conspirator's declaration in determining whether the factual predicate for admission of co-conspirator statements has been met. 2/ Other authority supports the Sixth Circuit's analysis of the effect of Rule 104(a). 3/ The Sixth Circuit's position is still the minority view, however. See Means v. United States, No. 83-6866 (Nov. 26, 1984) (White, J., dissenting from denial of certiorari); Arnott v. United States, 464 U.S. 948 (1983) (White, J., dissenting from denial of certiorari).

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1 Fed. R. Evid. 104 provides in pertinent part:

> (a) Questions of admissibility generally. Preliminary questions concerning * * * the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

2/ United States v. Means, 729 F.2d 1462 (6th Cir.), cert. denied, No. 83-6866 (Nov. 26, 1984); United States v. Piccolo, 723 F.2d 1234, 1240 & n.1 (6th Cir. 1983) (en banc), cert. denied, 466 U.S. 970 (1984); United States v. Shoun, 714 F.2d 143 (6th Cir. 1983), cert. denied, 465 U.S. 1012 (1984); United States v. Arnott, 704 F.2d 322, 325 (6th Cir.), cert. denied, 464 U.S. 948 (1983); United States v. Cassity, 631 F.2d 461, 464 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, 444 U.S. 1074 and 445 U.S. 904 (1980); United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978).

3/ United States v. Martorano, 561 F.2d 406 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978); United States v. Cryan, 490 F. Supp. 1214, 1241 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980); J. Weinstein & M. Berger, Weinstein's Evidence ¶ 104[05], at 104-44 (1982).

This Court has consistently denied certiorari in cases applying this interpretation of Rule 104. See notes 2 & 3 supra. There is no more reason to review this case than there was to review those previous cases, because evidence independent of Lonardo's out-of-court statements established that petitioner and Lonardo were co-conspirators. Greathouse's testimony established the existence of a scheme whereby Greathouse would obtain one kilogram of cocaine from his sources and Lonardo would sell the cocaine to buyer-distributors in Cleveland. On May 25, Greathouse spoke directly by telephone with a potential purchaser-distributor provided by Lonardo who promised an up-front payment of $15,000. That very evening the quarter-kilogram of cocaine was handed to and accepted by petitioner, who had been waiting in the Hilton parking lot and had more than $20,000 in cash in his car. Certainly these facts, which in no way depend on any out-of-court statements by Lonardo, establish that petitioner was a purchaser of Greathouse's cocaine.

These same facts, coupled with Lonardo's delivery of the cocaine from Greathouse to petitioner, independently establish the existence of a conspiracy to distribute cocaine. It is true that, because Greathouse was a government informant, no indictable conspiracy could have existed between Lonardo and Greathouse. See, e.g., United States v. DeBright, 742 F.2d 1196, 1199 (9th Cir. 1984). But a conspiracy between petitioner and Lonardo was shown.

Petitioner mischaracterizes his transaction with Lonardo by suggesting that it was nothing more than a purchase of cocaine, which is insufficient to establish conspiracy (Pet. 8, 13, 24-25). 4/ Instead, the evidence showed that Lonardo's "people"

4/ It is true that "neither the buyer nor the seller of narcotics can be guilty of conspiracy * * * merely by virtue of the relationship established by [a single] sale"; this is because, if "a crime is so defined that an agreement is required to commit it, the presumption is that that minimum agreement cannot also be punished as a conspiracy." United States v. Manzella, No. 85-2189 (7th Cir. May 20, 1986), slip op. 2-3. But a buyer-seller

(Continued)

(such as petitioner) were to sell the cocaine that they bought from Lonardo and Greathouse. As the court of appeals correctly observed (Pet. App. A7), a large volume of narcotics was involved. Both the amount and the price of the cocaine lead readily to an inference that it was intended for further distribution. See, e.g., United States v. Carrascal-Olivera, 755 F.2d 1446, 1451 (11th Cir. 1985); United States v. Del Aguila-Reyes, 722 F.2d 155, 157 n.4 (5th Cir. 1983).

As the court of appeals concluded (Pet. App. A6-A7), this evidence established the existence of a "chain" conspiracy -- a type common in the drug distribution business. The conspiracy necessarily involved Greathouse's sources, Greathouse himself acting the part of wholesaler, Lonardo as broker or middleman, and petitioner as retailer, but the involvement of Lonardo and petitioner by itself is sufficient to establish a conspiracy. See Carrascal-Olivera, 755 F.2d at 1450-1451. The common goal uniting the participants was the marketing of cocaine for profit in the Cleveland area. As the court of appeals explained (id. at A6), in a "chain" conspiracy "[o]ne can assume that participants understand that they are participating in a joint enterprise because success is dependent on the success of those from whom they buy and to whom they sell." See also, e.g., United States v. Warner, 690 F.2d 545, 549 (6th Cir. 1982); United States v. Martino, 664 F.2d 860, 876 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982).

Thus, there is no merit to petitioner's claim that the court of appeals misapplied Fed. R. Evid. 801(d)(2)(E). 5/

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relationship between two individuals does not automatically preclude a finding that they are co-conspirators: "where there is additional evidence beyond the mere purchase or sale, from which knowledge of the conspiracy may be inferred, courts have upheld conspiracy convictions." United States v. Grunsfeld, 558 F.2d 1231, 1235 (6th Cir. 1977), cert. denied, 434 U.S. 872 (1978).

5/ Lonardo's statement on May 12 that he had talked to his "people" and they were interested gives rise to an inference that petitioner had begun to conspire with Lonardo no later than May (Continued)

b. Nor is there any merit to petitioner's contention that the admission of Lonardo's out-of-court statements violated the Confrontation Clause because they were unreliable. To be sure, this Court has held that when a hearsay declarant is not present for cross-examination at trial, his statement is admissible only if it bears adequate "indicia of reliability." See, e.g., Ohio v. Roberts, 448 U.S. 56, 65-66 (1980); Mancusi v. Stubbs, 408 U.S. 204, 213 (1972). The Court also has held, however, that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. at 66. As the court of appeals concluded (Pet. App. A5), the co-conspirator rule qualifies as such a "firmly rooted" exception. Accord, United States v. Peacock, 654 F.2d 339, 349-350 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983). See also United States v. Molt, 758 F.2d 1198 (7th Cir. 1985) (evidence admitted under co-conspirator rule automatically satisfies Sixth Amendment); United States v. Lurz, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1055 (1982) (same); Ottomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973) (same). After all, this Court adopted the co-conspirator rule more than a century and a half

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12. Ignoring that out-of-court statement, petitioner is no better off, even if the other evidence does not show petitioner's involvement in the conspiracy until May 25; a person who joins a conspiracy already in progress is responsible for the acts and statements of others in furtherance of the conspiracy before he joined it. See, e.g., United States v. Gravier, 706 F.2d 174, 177-178 (6th Cir.), cert. denied, 464 U.S. 996 (1983); United States v. Sarno, 456 F.2d 875, 878 (1st Cir. 1972). Assuming arguendo that this evidence did not even show the existence of a conspiracy before May 25, any error committed in admitting pre-May 25 statements was harmless. On May 25, petitioner spoke directly with Greathouse about the cocaine transaction; Lonardo had a later conversation with Greathouse in which he arranged the transaction; and Lonardo then delivered the large quantity of cocaine from Greathouse to petitioner. These events of May 25, by themselves, were sufficient to establish the existence of a conspiracy between petitioner and Lonardo to distribute cocaine, and other evidence showing the existence of the conspiracy was merely cumulative.

ago (see United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469-470 (1827)), and since then has frequently reaffirmed, applied, and refined it. 6/

In recently reaffirming the validity of the co-conspirator rule in United States v. Inadi, No. 84-1580 (Mar. 10, 1986), the Court observed that the admission of co-conspirator declarations actually furthers the purpose of the Confrontation Clause to advance the truth-determining process. Slip op. 8. The Court explained that "it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force" and therefore that co-conspirator statements "are usually irreplaceable as substantive evidence" (ibid.). This discussion is in harmony with the recognition by courts of appeals that, as "contemporaneous statements in an ongoing business relation," co-conspirator declarations are reliable in the same sense, for example, that "contracts or negotiations among legitimate business partners usually portray accurately the affairs of those involved." United States v. Molt, 772 F.2d 166, 168-169 (7th Cir. 1985).

It is true that some courts of appeals have required a separate, individualized inquiry into whether co-conspirator statements are sufficiently reliable for Confrontation Clause purposes. See, e.g., United States v. Szabo, No. 85-1686 (10th Cir. May 12, 1986), slip op. 9-10; United States v. DeLuna, 763 F.2d 897, 909-910 (8th Cir. 1985); United States v. Ammar, 714 F.2d 238, 254-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. Perez, 658 F.2d 654, 660 & n.5 (9th Cir. 1981); United States v. Wright, 588 F.2d 31, 37-38 (2d Cir. 1978), cert.

6/ See, e.g., United States v. Nixon, 418 U.S. 683, 701 (1974); Anderson v. United States, 417 U.S. 211, 218 (1974); Dutton v. Evans, 400 U.S. 74, 81 (1970) (opinion of Stewart, J.); Wong Sun v. United States, 371 U.S. 471, 490 (1963); Lutwak v. United States, 344 U.S. 604, 617-618 (1953); Krulewitch v. United States, 336 U.S. 440, 442-443 (1949); Glasser v. United States, 315 U.S. 60, 74-75 (1942).

denied, 440 U.S. 917 (1979). The statements at issue here clearly pass this test as well.

Even those courts that do not regard co-conspirator statements as automatically reliable for Confrontation Clause purposes have indicated that, except in unusual circumstances, evidence that is properly admitted under the co-conspirator rule will not violate the Confrontation Clause. Szabo, slip op. 9 n.4; DeLuna, 763 F.2d at 910. They acknowledge that "'[i]n most cases the determination that a declaration is in furtherance of the conspiracy * * * will decide whether sufficient indicia of reliability were present. While there may be exceptions, we do not think that they will be frequent.'" Wright, 588 F.2d at 38 (quoting United States v. Puco, 476 F.2d 1099, 1107-1108 (2d Cir.), cert. denied, 414 U.S. 844 (1973)); accord, Ammar, 714 F.2d at 256; United States v. Nelson, 603 F.2d 42, 46 (8th Cir. 1979). In assessing reliability, these courts generally examine four factors derived from Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (opinion of Stewart, J.). They are (Ammar, 714 F.2d at 256 (quoting Perez, 658 F.2d at 661)):

> (1) Whether the declaration contained assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

Lonardo's out-of-court statements in the instant case clearly were reliable under this analysis. In particular, the conversations alluding to petitioner, Lonardo's "gentleman friend," concerned ongoing and future transactions, specifically arrangements for the cocaine transaction. (Insofar as the statements concerned Lonardo's past relationship with Greathouse, Lonardo had no motive to lie and obviously could not have done so successfully, since Greathouse necessarily was as familiar with the relationship as was Lonardo.) Lonardo as declarant clearly had knowledge of petitioner's identity and role in the activities --

indeed, he arranged for petitioner to have that role. There is no possibility that Lonardo was relying on faulty recollection; he was simply describing the current arrangement for the exchange. And there is no reason to believe that Lonardo misrepresented petitioner's involvement in the crime: Lonardo had no motive to lie about the existence of "people" or a "gentleman friend" who would purchase Greathouse's cocaine, for if such people did not exist Lonardo would have had nothing to gain by claiming that they did. Moreover, the existence of the "gentleman friend," and the identification of petitioner as that friend, were strongly corroborated by the evidence that petitioner did in fact purchase Greathouse's cocaine through Lonardo.

Indeed, petitioner makes no attempt to address any of these four factors or any other reason why the statements could be said to be unreliable. In short, no federal court of appeals would have excluded Lonardo's statements under the Confrontation Clause. 7/

2. Petitioner also contends that the evidence was insufficient to support his convictions for conspiring to distribute cocaine (Pet. 21-28) and for possessing cocaine with intent to distribute it (Pet. 28-29). As previously discussed, the evidence independent of Lonardo's hearsay statements to Greathouse by itself established the existence of a "chain conspiracy" to market cocaine for profit in Cleveland, with at least Lonardo and petitioner participating, petitioner playing the role of retailer

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7/ Relying on Dutton v. Evans, 400 U.S. 74, 87 (1970) (opinion of Stewart, J.), petitioner argues (Pet. 22) that the admission of Lonardo's statements was unconstitutional because the statements were "crucial" to the prosecution and "devastating" to the defense. We strongly disagree that Lonardo's statements were in any way crucial to the prosecution. To the contrary, the actions of Lonardo and petitioner on May 25, without the out-of-court statements by Lonardo, would have provided an ample basis for the jury to convict (see note 5 supra). And even if petitioner were correct that these statements were "crucial," that would be of no moment. Nothing in Dutton suggests that reliable co-conspirator statements become inadmissible under the Confrontation Clause just because they are particularly probative of guilt. Inadi suggests the contrary.

of the cocaine. The additional evidence of Lonardo's conversations with Greathouse corroborated Greathouse's testimony that he was to supply the cocaine and that Lonardo was to line up buyer-distributors and to obtain partial payment from them.

Likewise, the evidence was sufficient to support petitioner's conviction for possessing cocaine with intent to distribute it. An FBI agent testified that he saw Lonardo give petitioner a large quantity of cocaine and that petitioner accepted it. When the agents arrested petitioner immediately thereafter, they found the cocaine in his car. Petitioner suggests, however (Pet. 28-29), that the evidence fell short of establishing that he knew the bags that Lonardo gave him contained cocaine. In light of the clandestine manner in which the transaction was carried out, the $21,000 in cash found in petitioner's car, and the telephone call Greathouse had with Lonardo's "gentleman friend," the jury was clearly entitled to conclude that petitioner knew that the substance he received from Lonardo was cocaine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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